IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT

JODHPUR.

JUDGMENT.

Hazari vs. Ladu & ors.

S.B. Civil Second Appeal No. 92/1990 against the judgment and decree dated 20.11.1990 passed by the learned Addl. District & Sessions Judge, Bhilwara in Civil Appeal No.2/90.

Date of Judgment: April 10, 2007.

PRESENT
HON'BLE MR. PRAKASH TATIA,J.

Mr. J.K.Bhaiya for the appellant.
Mr. Anil Bachawat for the respondents.

BY THE COURT:

This second appeal is against the order passed by the appellate court dated 20.11.1990 by which the first appellate court in decree holder's appeal no.2/90 held that the appeal preferred by the decree holder against the order of the executing court dated 19.1.1990 is not appealable order, as according to the appellate court, the order in fact was passed under Section 47 ,C.P.C. and not on application under Order 21 Rule 97 and 101,C.P.C.

The learned counsel for the appellant submitted that the respondent judgment debtors submitted petition under Order 21 Rule 97 read with Rule 101,C.P.C. and raised grievance that the decree holder appellant took possession of entirely different property than the

property for which the decree was passed by the court in favour of the decree holder and, therefore, the judgment debtors are entitled to take the possession back from the decree holder under Order 21 Rule 100,C.P.C. The said objection petition was decided by the executing court and the order was passed by the executing court under Rule 100 of Order 21, C.P.C. holding that the respondent judgment debtors are entitled to take possession of the property mentioned in the order. In view of the above, the order in fact was passed under Rule 100 of Order 21,C.P.C. and any order passed in such proceedings is to be treated as decree as provided under Rule 103 of Order 21,C.P.C. Therefore, the appellate court committed error of law in dismissing the appeal of the appellant-decree holder.

The learned learned counsel for the respondents submitted that on merit the decree holder has no case. The decree holder has executed the decree and took possession of the property of the respondent-judgment debtors for which no decree was ever passed by any court in favour of the plaintiff-decree holder. It is also submitted that the objection submitted by the respondents was not only under Order 21 Rule 97, C.P.C. but was also under Section 47 C.P.C.

I considered the submissions of the learned counsel for the parties and perused the record.

The judgment debtors themselves filed the petition under Order

21 Rule 97 and Rule 101, C.P.C. for determination of their right, title and interest in the property. They very specifically pleaded their right in the property and they clearly mentioned that their petition under Order 21 Rule 101,C.P.C., though there is mention that the petition is also under Section 47,C.P.C.. Section 47 only provides for submitting objection against the execution of the decree when any question arises between the parties about the executability of the decree, its discharge and satisfaction. The separate suit for these execution, discharge and satisfaction of the decree is barred. But if in execution of decree, if possession is taken by the decree holder, then the procedure available is under the provisions starting from Rule 99 of Order 21, C.P.C. Therefore, the order in whatever form which has been passed by the executing court dated 19.1.1990, is a decree as per Rule 103 of Order 21,C.P.C. and hence was appealable. Therefore, the order of the first appellate court dated 20.11.1990 deserves set aside and the substantial question of law framed by this Court whether the learned Addl. District Judge was wrong in holding that the appeal filed by the appellant to be not maintainable is decided in favour of the appellant. The substantial question no.2 does not survive because the question can be decided in the appeal which is required to be heard by the first appellate court.

In view of the above reasons, the appeal of the appellant is allowed. The order dated 20.11.1990 passed by the appellate court is

set aside. The matter is remanded back to the first appellate court with a direction to decide the appeal expeditiously within a period of three months from the receipt of the record and copy of the order from this Court. The office is directed to send the record forthwith to the first appellate court. Both the parties are directed to remain present before the executing court on 1.5.2007. Meanwhile, the respondents shall not take possession of the property in pursuance of the order passed by the executing court till the appeal is decided by the first appellate court.

(**PRAKASH TATIA),J.**

mlt.